Filed 12/27/04 In re Rober F. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ROBERT F., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. MELANIE F., Defendant and Appellant.	G033854 (Super. Ct. No. DP009436) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard E. Behn, Judge. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Lori D. Barcelona, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

Melanie F. appeals from an order of the juvenile court denying her services to facilitate reunification with her son, Robert F. Melanie argues the court erred in denying services pursuant to Welfare and Institutions Code section 361.5, subdivisions (b)(10) and (b)(11).[1] She asserts the court lacked sufficient evidence to support its conclusion that she had failed to make reasonable efforts to treat the problems that had led to the earlier removal of Robert's siblings from her custody.

We disagree. The evidence, which included continued drug use and domestic violence, coupled with Melanie's persistent denial of any substantial problems, was more than sufficient to support the conclusion Melanie's past efforts to address her problems had not been reasonable. As she herself acknowledges, two earlier allegations of neglect involving Robert had been sustained prior to the incident of November 2003, when he was taken into custody at the age of only nine months.

The fact Melanie has expressed a willingness to treat her problems now, only after Robert has been detained, is not the issue. The point of section 361.5, subdivisions (b)(10) and (b)(11) is to empower the court to bypass reunification services in certain cases where the parent's past history of failure clearly indicates that additional efforts would not be warranted. If the parent's mere willingness to try again, only because yet another child has been removed, were sufficient to negate the court's power to deny services, the bypass option would be of little significance. The order is affirmed.

* * *

Robert, now nearly two years old, was taken into protective custody by a Fullerton Police Department officer, with the assistance of an emergency response social worker, in November of 2003. The police officer was responding to an incident of domestic violence between Melanie and Robert's father. According to the report filed by the Orange County Social Services Agency (SSA), "[t]he father and mother were in an

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[1] All further statutory references are to the Welfare and Institutions Code.

argument over money, which led to the mother breaking the father's guitar. The mother feared retaliation and attempted to stay awake, however she did not succeed and fell asleep. She was awakened by the father, who punched her in the ear/head area, causing an injury to the mother's ear. The father has struck the mother on numerous prior occasions in the presence of the child, upsetting the child. The family was receiving Family Maintenance Non-Court services as a result of domestic violence, and further there is a restraining order against the father to protect the mother. Both parents violated the restraining order, resulting in the father's November 18, 2003 arrest. The mother refused to recognize safety concerns, makes excuses for the father, refuses to leave him, and refuses to obtain domestic violence services. In addition, the father has a substance abuse problem, specifically 'speed,' and continues to use, the last time being approximately one week [previously]. Further, the mother has observed the father masturbate in the presence of the child on at least two separate occasions."

Although Robert was only nine months old at the time he was taken into protective custody, it was not the first time he had come to the attention of SSA. In March of 2003, an allegation of "general neglect" was substantiated against Robert's father, after he became angry with Melanie and kicked Robert's stroller so hard it caused Robert to "fly out." Luckily, Melanie managed to catch Robert before he hit the ground. She minimized the domestic violence and stated she had no plans to leave Robert's father. She and Robert's father declined family maintenance non-court services at that time.

Then in July of 2003, when Robert was five months old, another allegation of general neglect was sustained, after the Fullerton Police Department responded to a call about an assault and battery in progress. Robert's father had struck Melanie in the head with a metal cane, in Robert's presence, and Melanie was transported to the hospital. The police obtained an emergency protective order, and called in an emergency response social worker. Melanie reported to the social worker that she had a history of

drug use and suffered from Hepatitis C. She also stated that Robert's father continued to use "speed," and she admitted to an ongoing pattern of domestic violence in their relationship. She nonetheless refused the social worker's suggestion of a shelter, stating she would not leave Robert's father. The family was referred for family maintenance non-court services.

In addition to the repeated neglect charges involving Robert, Melanie also had a history of repeated contacts with SSA in regard to her other children. Robert's half-siblings, Adam and Josette P., were taken into protective custody in December of 1993, based upon allegations of physical abuse, severe neglect and general neglect. They were declared dependents of the juvenile court based upon a petition alleging that Melanie and the children's father had engaged in domestic violence in front of the children, and that the home was in an unsafe and unhealthy condition for the children. Melanie failed to reunify with Adam and Josette and they were ultimately adopted by a non-relative in 1999.

Robert's other half-sibling, Genevieve P., was taken into protective custody in 1994, and declared a dependent of the court, based upon allegations that Melanie and the father had engaged in willful and negligent failure to provide her with adequate food, shelter or medical treatment. The child was diagnosed with sepsis during a routine medical checkup, and her parents had failed to recognize she was ill despite the fact she was running a temperature of 103. The petition also alleged the family's residence was unsafe and unsanitary, including a strong odor caused by an overflowing cat box, and a filthy refrigerator used to store Genevieve's formula. Moreover, the parents had used ammonia in an attempt to mask the stench of the cat box, and the ammonia fumes were so powerful they presented a danger to Genevieve's nasal passages and lungs.

Neither Melanie nor Genevieve's father participated in reunification services with her, and she was placed under the guardianship of her maternal grandmother. However, because of subsequent problems in the grandmother's home,

Genevieve was removed from her custody, and placed in a foster home in Riverside County.

On the day after Robert's detention, Melanie was interviewed by the social worker. She accused the social worker of ruining her life. She appeared to be under the influence of drugs or alcohol, as her speech was slurred and she had difficulty enunciating words and articulating complete thoughts. Melanie stated she did not want to press charges against Robert's father, and did not want a restraining order against him. Melanie also stated she was unwilling to attend domestic violence classes or counseling, or participate in drug rehabilitation, and insisted Robert's father did not hit her "that much any more."

Melanie also denied that Robert's father had a serious drug problem, explaining "[h]e's cut way down." When asked about her allegation that Robert's father had masturbated in Robert's presence, she stated that on two occasions, she was taking a shower and could see Robert's father masturbating, but not whether Robert was observing him. Melanie also stated that on one occasion the prior week, she had put Robert into pajamas which are difficult to snap. Shortly thereafter, she noted that the pajamas were rearranged and not snapped properly. When she questioned Robert's father about it, he denied knowing anything about it. Melanie was concerned, however, because Robert's father had himself been molested as a child, had lived on the streets as a teenager with a gay man who "forced himself on [Robert's father]," and was bisexual. Melanie stated that if Robert's father had sexually abused him, she wanted him to go to prison "for the rest of his life. But if he had not, she "want[ed] him to come home."

Melanie later reiterated, in an interview with police officers, her suspicions about Robert's sexual abuse. She indicated that her experience of finding Robert's pajamas re-snapped incorrectly had occurred on "more than one occasion."

In her interview with the social worker, Melanie denied voluntarily using drugs herself, but accused Robert's father of putting drugs into her food. She also

claimed Robert's father had "forced" her to use methamphetamine, and threatened to hit her if she resisted. She said he had last done that a couple of weeks previously.

SSA filed a dependency petition accusing Robert's parents of "failure to protect," of subjecting Robert to "serious emotional damage," and "sexual abuse," and of "abuse of sibling" based upon Melanie's history with her other children.

Robert was ordered detained by the court, and a jurisdictional and dispositional hearing was scheduled for January of 2004. In its initial jurisdiction/disposition report to the court, SSA recommended the dependency petition be granted, but requested additional time to evaluate Melanie's past history and contacts with SSA in regard to her other children, prior to formulating its recommendation for disposition.

The jurisdictional hearing was ultimately held on February 24, 2004, and the court sustained the petition. It ordered that a separate dispositional hearing be set for April 8, 2004.

In connection with the dispositional hearing, SSA reported that Melanie had been visiting Robert on a consistent basis, and that the visits went well, but that she was otherwise doing little to address her problems. She was reportedly staying temporarily with a friend, but had no permanent residence. Moreover, although SSA had referred Melanie to a perinatal drug treatment program in February, she had not complied with its requirements. According to a telephone report received from a representative of the program, Melanie had been required to test twice per week, but had only done so once. Melanie "ha[d] missed all other tests. She has not been compliant with her appointments, nor has she followed up with staff." Melanie had also been referred to a domestic violence class, and although she initially stated she would be attending, she later changed her mind, explaining she was unable to enroll due to lack of funds.

SSA recommended that reunification services be offered to Robert's father (despite little hope of their success) but not to Melanie, citing section 361.5, subdivisions

(b)(10) and (b)(11). SSA explained in its report that "[Melanie] is essentially homeless. [She] has no [re]liable source of income, nor has she demonstrated that she is able or willing to provide ongoing care for the child. [¶] Although [Melanie] has visited with the child consistently, she has not demonstrated in any way that she has resolved her drug issues or her propensity to become involved in domestic violence relationships."

The trial court accepted SSA's recommendation and concluded "reunification services need not be provided to [Melanie.]"

I

Section 361.5, subdivision (b) provides in pertinent part that "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶]

"(10) That the court ordered termination of reunification services for any siblings of the child because the parent or guardian failed to reunify with the sibling after the sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling of that child from that parent or guardian.

"(11) That the parental rights of a parent over any sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling of that child from the parent."

In this case, there is no dispute that Melanie has had other children removed from her custody due to problems with domestic violence and neglect. She failed to reunify with those other children, and her parental rights were terminated as to two of them. Nonetheless, Melanie argues the court erred in denying her reunification services

because there was insufficient evidence to support the conclusion Melanie had not made reasonable efforts to treat the problems that led to the removal of her other children. We disagree.

While it is true that "the 'reasonable effort to treat' standard found in former subdivision (b)(10) (now subd. (b)(10) and (11)) is not synonymous with 'cure'" (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464), it does actually require a reasonable effort to resolve the problem prior to the new dependency action — some indication that the prognosis for reunification is looking better than it did at the conclusion of the prior dependency. In this case, there was no such indication. Melanie had done nothing to address the ongoing pattern of domestic violence, drug abuse and neglect to which she had subjected her other children.

Melanie points out it was she who telephoned the police in connection with the domestic violence incident that resulted in Robert's dependency. She also informed SSA of her suspicions regarding Robert's possible sexual abuse. She argues that those facts suggest she was acting responsibly and reasonably in addressing the problems.

But the fact Melanie was willing to reach out for help during a violent crisis is only part of the picture. More significant is the fact that she was unwilling to do anything about the pattern of violence once the crisis had passed. Despite the fact that Melanie herself had called the police, she was adamant she did not want to press charges against Robert's father and initially angry at SSA for "ruining" her life. She stated she was unwilling to attend domestic violence classes or counseling, or participate in drug rehabilitation. She stated that Robert's father did not hit her "that much any more" and denied that he had a serious drug problem.

The only chink in Melanie's armor of denial was her statement that if Robert's father had sexually abused him, she wanted him to go to prison "for the rest of his life." But she went on to clarify that if he had not, she "want[ed] him to come home."

This, despite the fact Melanie had also accused Robert's father of forcing her to take drugs and slipping them into her food.

Melanie's refusal to acknowledge the significance of the domestic violence and drug use permeating her life was also part of her pattern. The incident of November 2003, when Robert was taken into protective custody, was the third such incident during the first nine months of his life. In fact, Melanie even had a domestic violence restraining order in place against Robert's father, which she was violating, on the day Robert was taken into custody.

In short, there was an abundance of evidence that Melanie had not made reasonable efforts to treat the problems interfering with her ability to parent. The occasional phone call to the police, when things get really bad, is not "treatment."

Further, the fact that Melanie was subsequently able to get past her anger at SSA, and ultimately agreed to participate in drug treatment and domestic violence programs in connection with Robert's current dependency does not alter the analysis. Section 361.5, subdivisions (b)(10) and (b)(11), ask the court to consider the parent's treatment efforts in the past tense; i.e., whether the "parent or guardian *has not* subsequently *made a reasonable effort to treat the problems* that led to removal of the sibling of that child from that parent or guardian." Those sections do not concern themselves with whether the parent appears to be currently willing to make such efforts.

Moreover, if the fact that a parent was willing to participate in reunification services after the child has been detained, were sufficient to prevent the court from denying those services, the exemption would have no meaning. Under that analysis, any parent who wanted services would, ipso facto, be deemed entitled to them. That is not the law.

II

Melanie also argues that even if the court could properly have denied her services under section 361.5, subdivisions (b)(10) and (b)(11), it nonetheless abused its

discretion in doing so, because services were offered to Robert's father. According to Melanie, "[o]ffering services to only one of two parents made no sense."

We cannot agree. Section 361.5, subdivision (c) provides in pertinent part that "[t]he court may not order reunification for a parent or guardian described in paragraph . . . (10), (11) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." Thus, the court's only discretionary call was whether the provision of reunification services for Melanie was in Robert's best interests. Unless the court concluded they were, it could not order reunification.[2]

In this case, there is nothing in the record which would *compel* the court to conclude that reunification services with Melanie were in Robert's best interest, merely because Robert's father was to be offered such services. Other than the conclusory assertion that it makes "no sense" to offer services to only one parent, Melanie fails to articulate any basis for an attack on the court's determination, and we can find none that would convince us it was an abuse of discretion.

The order is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.
ARONSON, J.

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[2] Melanie notes that the language of section 361.5, subdivision (c) was changed from "[t]he court *shall* not order reunification . . . unless the court finds . . . that reunification is in the best interest of the child," to "the court *may* not order reunification," (Italics added.) She contends that alteration was intended to give the court some additional measure of discretion to offer the services even where the court does not find it would be in the child's best interest to do so. We disagree. The phrase "the court may not do [x] unless" is not distinguishable from the phrase "the court shall not do [x] unless." In both cases, the clear import is that the court *can* do "x" only if the condition is met. In any event, in the absence of some clear authority (and Melanie offers none) we would certainly not be inclined to interpret subdivision (c) of section 361.5 as allowing the court to order reunification services to a parent who falls within paragraphs (10) and (11) of subdivision (b) *despite* its conclusion that such services would not be in the child's best interests.